

November 9, 2010

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**VIA ELECTRONIC FILING**

Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 E Street, S.W.  
Washington, D.C. 20024

Re: *GNP Rly Inc. – Acquisition and Exemption – Redmond Spur and Woodinville*  
*Subdivision*, STB Finance docket No. 35407; 228172

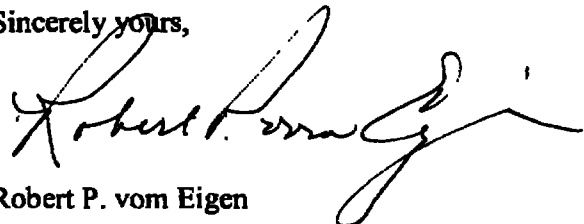
*BNSF Railway Company – Abandonment Exemption – In King County, WA*, STB docket  
No. AB-6 (Sub No. 463X); and 228173

*BNSF Railway Company – Abandonment Exemption – In King County, WA* STB docket  
No. AB-6 (Sub No. 465X). 228174

Dear Ms. Brown:

Enclosed for filing please find the Comments of Central Puget Sound Regional Transit  
Authority in each of the above captioned proceedings.

Sincerely yours,



Robert P. vom Eigen

Enclosure

cc: All parties on attached Certificate of Service

BOSTON  
BRUSSELS  
CENTURY CITY  
CHICAGO  
DETROIT

JACKSONVILLE  
LOS ANGELES  
MADISON  
MIAMI  
MILWAUKEE

NEW YORK  
ORLANDO  
SACRAMENTO  
SAN DIEGO  
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SAN FRANCISCO  
SHANGHAI  
SILICON VALLEY  
TALLAHASSEE  
TAMPA

TOKYO  
WASHINGTON, D.C.

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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35407  
GNP RLY INC.  
- ACQUISITION AND EXEMPTION -  
REDMOND SPUR AND WOODINVILLE SUBDIVISION**

**STB DOCKET NO. AB-6 (SUB. NO. 463X)  
BNSF RAILWAY COMPANY  
- ABANDONMENT EXEMPTION -  
IN KING COUNTY, WA**

**STB DOCKET NO. AB-6 (SUB. NO. 465X)  
BNSF RAILWAY COMPANY  
- ABANDONMENT EXEMPTION -  
IN KING COUNTY, WA**

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**COMMENTS OF CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY**

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Dated: November 9, 2010

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB FINANCE DOCKET NO. 35407  
GNP RLY INC.  
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BNSF RAILWAY COMPANY  
- ABANDONMENT EXEMPTION –  
IN KING COUNTY, WA**

**STB DOCKET NO. AB-6 (SUB. NO. 465X)  
BNSF RAILWAY COMPANY  
- ABANDONMENT EXEMPTION –  
IN KING COUNTY, WA**

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**COMMENTS OF CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY**

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Central Puget Sound Regional Transit Authority (“Sound Transit”), through its undersigned counsel, offers the following comments concerning the Verified Petition for Exemption and Petitions to Vacate Notice of Interim Trail Use or Abandonment previously filed with the Surface Transportation Board (the “Board”) by GNP Railway, Inc. (“GNP”).<sup>1</sup>

On August 24, 2010, pursuant to 49 U.S.C. § 10502, GNP filed a petition for exemption from regulation under 49 U.S.C. § 10902 to acquire the residual common carrier rights and obligations, and to reactivate rail service on portions of the following two currently rail banked rail lines in the Seattle, Washington metropolitan area: the Redmond Spur and the Woodinville

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<sup>1</sup> See GNP’s Verified Petition for Exemption Pursuant to 49 U.S.C. § 10502, STB Finance Docket No. 35407, GNP Rly., Inc. – Acquisition and Operation Exemption – Redmond Spur and Woodinville Subdivision (filed August 24, 2010); GNP’s Petition to Vacate Notice of Interim Trail Use or Abandonment, STB Docket No. AB-6 (Sub. No. 463X), BNSF Railway Company – Abandonment Exemption – In King County, WA (filed August 24, 2010) (Redmond Spur); GNP’s Petition to Vacate Notice of Interim Trail Use or Abandonment, STB Docket No. AB-6 (Sub. No. 465X), BNSF Railway Company – Abandonment Exemption – In King County, WA (filed August 24, 2010) (Woodinville Subdivision).

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Subdivision. GNP also filed petitions to vacate the notices of interim trail use issued for the two aforementioned rail banked lines. On September 10, 2010, the City of Redmond, Washington, and King County, Washington jointly moved for an extension of time to respond to GNP's petition.<sup>2</sup> On September 15, 2010, the Surface Transportation Board issued a notice requesting comments on GNP's petitions by October 20, 2010.<sup>3</sup> The deadline for submitting comments was subsequently extended until November 9, 2010 pursuant to a joint petition by GNP and certain intervening parties in order to permit completion of certain discovery.<sup>4</sup> On October 7, 2010, Sound Transit filed its Notice of Intent to Participate in these proceedings. Sound Transit submits with these comments, along with the attached Verified Statement of its Chief Executive Officer Joan M. Earl, attached hereto as Exhibit A.

**I. FACTUAL BACKGROUND AND SOUND TRANSIT'S INTERESTS IN THIS PROCEEDING**

Sound Transit was created by the Pierce, King, and Snohomish Counties in the metropolitan Seattle area by action of their respective county councils in accordance with applicable state law.<sup>5</sup> Under Washington state law, Sound Transit is authorized to plan, construct, and permanently operate a high-capacity system of transportation infrastructure and services to meet regional public transportation needs in the Central Puget Sound region.<sup>6</sup> Sound

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<sup>2</sup> See Motion of King County, Washington, and City of Redmond, Washington, to Extend Time to Respond (filed September 10, 2010).

<sup>3</sup> The Surface Transportation Board subsequently published the notice requesting comments in the Federal Register. See Request for Comments, 75 Fed. Reg. 57327 (September 20, 2010).

<sup>4</sup> See STB Order in these joint proceedings, served October 19, 2010.

<sup>5</sup> See Verified Statement of Ms. Joan M. Earl, ¶ 2 (hereinafter "Earl V.S. at ¶ \_\_\_\_").

<sup>6</sup> *Id.*

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Transit carried nearly 19 million passengers in 2009 throughout its system, and is on schedule to carry nearly 25 million passengers in 2010.<sup>7</sup>

In 1996 and 2008, voters approved funding to implement a regional high-capacity transportation system for the Central Puget Sound region.<sup>8</sup> Sound Transit's 2008 voter-approved plan provided for both light rail (the "East Link" project) and commuter rail service in the Woodinville Subdivision and the Redmond Spur, the same rail banked lines at issue in GNP's petitions.<sup>9</sup> Due to projected revenue shortfalls caused by the recent recession, Sound Transit is reevaluating all proposals for instituting new transit services. Sound Transit's management has recommended to its Board to proceed with the East Link project, but to defer funding of the commuter rail service in the Woodinville Subdivision at this time.<sup>10</sup>

In recent months, Sound Transit has specified its preferred alternative routing for the East Link service for its draft Environmental Impact Statement that will use portions of the Woodinville Subdivision and the Redmond Spur. Under this preferred alternative, Sound Transit will build the East Link trackage through a portion of the Redmond Spur terminating at a downtown Redmond station located near 161<sup>st</sup> Avenue.<sup>11</sup> The preferred alternative would also occupy a one-mile segment of the Woodinville Subdivision (called the "Bellevue Mile") located

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at ¶ 4.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at ¶ 4-5.

<sup>11</sup> *Id.* at ¶ 6.

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at or about MP 12.4 and MP 13.5 at a location approximately eight miles south of the location at which GNP seeks to reactivate service.<sup>12</sup>

Sound Transit has concerns about GNP's proposed reactivation of freight service on the rail banked lines, and is participating in these proceedings before the Board because it is in the process of acquiring certain real property interests in the Woodinville Subdivision and the Redmond Spur to further its ability to provide high-capacity transit services within the Central Puget Sound Region through construction of the East Link project.<sup>13</sup> The infrastructure that Sound Transit plans to construct will be designed to share the Woodinville Subdivision and Redmond Spur rail corridors, although not the tracks themselves, with any reactivated freight service provider as authorized by the Board.<sup>14</sup> As underscored by Ms. Earl's Verified Statement, Sound Transit must ensure that the freight service currently contemplated by GNP in its proposed reactivation is economically viable and financially capable of sustaining the ongoing investments needed to provide safe and reliable freight operations that will not endanger Sound Transit workers or the many passengers who may be present in the shared corridors of the Woodinville Subdivision and the Redmond Spur given Sound Transit's planned expansion into such areas.<sup>15</sup> However, reactivation of freight service at either location, if found by the Board to be necessary and appropriate, will not be precluded by these transit uses of the two rights-of-way.<sup>16</sup>

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<sup>12</sup> *Id.* at ¶7.

<sup>13</sup> *Id.* at ¶ 3.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at ¶ 3.

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As a future owner of assets near to and in an area where GNP proposes to reactivate service, Sound Transit must understand what limitations, if any, may apply to it as the owner of the underlying assets over which GNP intends now to operate or may in the future apply for the right to operate. As owner of such assets, Sound Transit anticipates that it will seek reasonable rentals for the use of its assets for reactivation of freight service, and appropriate reimbursement for upgrading and maintenance of the freight line, insurance and indemnification against losses to its property, employees, passengers or third parties caused by GNP's reactivated service.

Based upon public comments of a GNP officer, Sound Transit has reason to believe that an underlying motive behind GNP's petition to reactivate freight service is to provide certain excursion or other passenger service without complying with state and local environmental or land use laws.<sup>17</sup>

**Reference to Confidential Information:** [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

] The commuter rail funding referred to by GNP is recommended for deferral due to funding constraints. If the Sound Transit Board decides to suspend or cancel this project, then this

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<sup>17</sup> *Id* at ¶12.

<sup>18</sup> [REDACTED]

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funding will not be available to GNP or any other private commuter rail operator that had intended to propose on the project through a Sound Transit procurement process. See Earl V. S.

at ¶5. Confidential Information: [REDACTED]

[REDACTED] Presumably, GNP will similarly assert that as a "federal railway" otherwise applicable state laws of Washington will not apply to the introduction of those services.

In a presentation last week to Sound Transit's Board, GNP Chairman and C.O.O., Thomas Payne, stated that, "From ... early 2007 ..., we have told anyone who would ask...that we intended to re-activate the entire corridor portion-by-portion, on our schedule, as finances and event would allow. That is still our plan."<sup>19</sup> Mr. Payne is expansive about his commuter rail portion of the business plan: "Our dream is to ultimately connect the north end at Snohomish with Sounder [commuter rail service] and AMTRAK in Everett, and on the south end at Renton with Sounder and Link to SeaTac airport."<sup>20</sup>

Sound Transit's interests in this proceeding are not speculative. Therefore, Sound Transit asks this Board to closely analyze GNP's claims, to separate the dreams from the hard facts and to define what is and is not within the Board's power to order.

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<sup>19</sup> See Statement of Thomas Payne, Regarding the Sound Transit Proposed 2011 Budget and Proposed 2011 Service Implementation Plan, November 4, 2010, at p. 1, attached hereto as Exhibit D.

<sup>20</sup> *Id.* at 2. Unexplained is how GNP would bridge the gap in the Woodinville Subdivision created by the abandoned section between MP 10.5 and MP 11.25 that was consummated by BNSF in STB Docket AB-6 (Sub-No. 453X) by notice filed March 20, 2008.

## **II. ARGUMENT**

**A. Reactivation of Freight Service in Rail Banked Corridors by Operators that Have No Ownership Interest or Rights in the Corridor Should be Scrutinized to Determine Whether There is Sufficient Demand to Provide Safe Freight Service and Whether the Operator Has Obtained Rights to Gain Access to Corridor from Its Owners.**

GNP seeks to vacate interim trail use over the 9.1 miles of rail corridors in which it seeks to operate without describing any terms upon which it is prepared to compensate the owners of the Woodinville Subdivision and the Redmond Spur. Instead, it claims that it is entitled to vacate the interim trail use rights of King County based simply upon the unsubstantiated assertion that 250 carloads will be shipped each year.

None of the shipper letters attached to the petition or those generated more recently by GNP commit to ship any freight cars in the event service is reinstituted on the line. They “expect” or “prefer” to receive shipments by rail, citing increased diesel fuel prices, but there is no evidence that GNP has quoted rail rates or entered into transportation contracts that would reduce transportation costs to these shippers. However, even if there were 250 carloads of traffic per year (or less than five carloads per week), there is no indication that such traffic could provide sufficient revenue to GNP or its agent to upgrade, maintain and operate the 9.1 miles of right-of-way that are subject to the petition to vacate. Sound Transit understands that other government parties will submit additional information relating to the financial viability of GNP’s proposed freight operations.<sup>21</sup>

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<sup>21</sup> The recent letter of support filed in these proceedings late on November 5 by the President of Marketing Philharmonic, a marketing research firm, claims to have “synthesized hours of interviews” with a list of local government and business organizations that contain unattributed quotes which make clear that those interviewed were not talking about rail freight operations, but rather about excursion train services, which even if admissible in this proceeding, are totally irrelevant to it as shown in the next section of these comments.

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To the extent Sound Transit's East Link light rail services will occupy the same corridor as the proposed GNP freight service, it needs to have some comfort that GNP will be capable of providing safe transportation services that will not endanger Sound Transit's passengers or employees. GNP's financial viability is not readily apparent from its filings.

Unlike transactions involving rail banked corridors that are owned by the abandoning rail carrier or a successor in interest to such carrier, GNP's right of access to the line needs to be obtained from the owners of that line. Those owners who have interests in continuing use of those rights-of-way are entitled by virtue of their ownership to take steps to insure safe operation of the freight service, and to impose reasonable conditions, including rent, upon an entity that seeks to reactivate freight rail service over that right-of-way.

GNP cites *Georgia Great Southern – Abandonment & Discontinuance of Service – G.A.*, 6 S.T.B. 902, 906-8 (2003) for the proposition that satisfactory resolution of compensation issues cannot be a precondition to restoration of rail freight service. GNP Petition at 7-8. However, the circumstances in *Georgia Great Southern* involved reactivation of the service by the party that had the legal ownership rights to do so, and the issue was whether compensation for lost investments were owed to the trail user could impede the reactivation of service. That is clearly not the case here.

The Board has declared that it is not the proper forum to resolve questions of state contract or property law. *General Railway Corporation, D/B/A Iowa Northwestern Railroad – Exemption for Acquisition of Railroad Line – In Osceola and Dickinson Counties, IA*, Finance Docket No. 34867 (served June 15, 2007) slip op. at 4, and *James Riffin – Petition for Declaratory Order* Finance Docket No. 35245, (served September 15, 2009) slip op. at 6, *petition for review docketed*, 09-1277 (D.C. Cir., November 12, 2009). Moreover, there is no

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basis under Federal law that the Board can condemn or authorize the condemnation of the property interests held by parties that contracted with BNSF or its successors to acquire the property interests and physical assets in the Woodinville Subdivision or the Redmond Spur. *Cf.* 49 U.S.C. §10907 (authorizing a forced sale of a non-abandoned rail line to a “financially responsible person” upon payment of a price “not less than the constitutional minimum value”) and 49 U.S.C. §24311(a) and (c) (authorizing Amtrak to condemn rail carrier property under specified circumstances). Neither the Trails Act, nor the ICC Termination Act contains an equivalent provision governing acquisition of interests in rail banked rail rights-of-way.

The Board should determine in this case whether there is a bona fide basis upon which to reestablish rail freight service based upon the purported demand for service identified by GNP. If that has been established, then the Board should clarify that any operating authority granted GNP under 49 U.S.C. 10902 or order issued to partially vacate trail use in the Woodinville Subdivision or the Redmond Spur cannot take effect until GNP has obtained from the owners of the corridor the rights to gain access to their property for that purpose.

**B. The STB Lacks Jurisdiction to Direct the Provision of Intrastate Excursion Passenger Service and Should Declare that State law applies to the Initiation of Such Service.**

Based upon public statements made by GNP’s Chief Financial Officer cited above, Sound Transit has reason to believe that an underlying motive behind GNP’s petition to reactivate freight service is to provide certain excursion or other passenger service. Sound Transit seeks the Board’s confirmation that it does not have jurisdiction to mandate an owner of a right-of-way to permit the rail trackage that it will acquire to be used for the purpose of transporting excursion train or other intrastate passenger service.

The Board has found that it lacks jurisdiction over intrastate excursion passenger service, such as that which would apparently be offered by GNP. Lacking such jurisdiction, the Board

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does not have the authority to impose an obligation on the owner of a right-of-way to permit specifically such excursion service. While GNP's Chief Financial Officer has insinuated that GNP would be immunized from compliance with state and local environmental and land use laws given its status as a "federal railway," the opposite is true. Because the Board lacks jurisdiction over any planned intrastate excursion service that might be offered, GNP is subject to applicable state and local laws in respect of its excursion service.

In the Board's decision in *Fun Trains, Inc. – Operation Exemption – Lines of CSX Transportation, Inc. and Florida Department of Transportation* ("Fun Trains"), the Board dismissed the proceedings before it because the Board found that it lacked jurisdiction over the planned intrastate excursion service proposed by the rail carrier.<sup>22</sup> The excursion service was planned to operate wholly within one state and service would not be offered between intermediate points along the line.<sup>23</sup> In discussing the applicable law, the Board noted that under 49 U.S.C. 10501(a)(2)(A), the Board has jurisdiction over transportation by rail carriers between a place in a state and a place in the same or another state as part of the interstate rail network.<sup>24</sup> In previous cases, the Board's predecessor agency, the Interstate Commerce Commission ("ICC") held that it did not have jurisdiction over "wholly intrastate rail passenger service where that service was not part of the interstate rail passenger network....On the other hand, the ICC has determined that it had jurisdiction over a railroad lying wholly within one state if the railroad participates in the movement of passengers from one state to another under common

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<sup>22</sup> *Fun Trains, Inc. – Operation Exemption – Lines of CSX Transportation, Inc. and Florida Department of Transportation*, Finance Docket No. 33472 (March 5, 1998).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

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arrangements with connecting carriers. i.e., by means of through ticketing, or when the railroad participates in the movement of freight in interstate or foreign commerce.”<sup>25</sup>

While GNP has not fully disclosed its plans for passenger excursion service, any service along the reactivated rail lines subject to this proceeding would be wholly intrastate. Further, there has been no suggestion that GNP would offer any sort of through ticketing arrangements so as to participate in the movement of passengers from one state to another. While GNP’s movement of freight within interstate commerce might give rise to an argument that the Board would have jurisdiction over the intrastate excursion passenger operations, in past cases declining to exercise jurisdiction, the Board has closely scrutinized the amount of freight actually being transported and has been willing to treat the freight and passenger operations differently (that is, by exercising jurisdiction over the freight operations, but not the passenger operations).

One of the key cases in this area is the ICC’s 1991 decision in *Napa Valley Wine Train, Inc. Petition for Declaratory Order (“Napa Valley”)*.<sup>26</sup> While the case was decided by the Board’s predecessor agency, the Board has continued to cite the decision, as in the *Fun Trains* case where the Board cited the *Napa Valley* case for the proposition that the Board does not have jurisdiction over wholly intrastate rail passenger service where that service was not part of the interstate rail passenger network.<sup>27</sup> As in the *Fun Trains* case, the excursion passenger service offered in *Napa Valley* was wholly within one state.<sup>28</sup> Unlike in the *Fun Trains* case, however, the operators of the Napa Valley Wine Train argued that their operations were in fact interstate

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<sup>25</sup> *Id.*

<sup>26</sup> *Napa Valley Wine Train, Inc. Petition for Declaratory Order*, 71 I.C.C.2d 954 (Sept. 19, 1991).

<sup>27</sup> *See supra*, note 1.

<sup>28</sup> *See supra*, note 5.

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because the railroad planned to offer through ticketing service on Amtrak and Greyhound Bus lines, and that such interstate passenger service subjected the railroad to the ICC's jurisdiction.<sup>29</sup> The ICC disagreed, however, noting that the train was marketed as a tourist excursion, not an interstate passenger service, and that it was likely that very few passengers would avail themselves of the through ticketing options, given that the Napa Valley Wine Train did not carry passengers directly to an Amtrak or Greyhound station.<sup>30</sup>

In addition to the ICC finding that the Napa Valley Wine Train's passenger operations were not interstate, the ICC also determined that the railroad's interstate freight operations did not make its intrastate passenger operations subject to ICC jurisdiction.<sup>31</sup> In determining that the Napa Valley Wine Train's freight operations did not provide the nexus to create ICC jurisdiction over the passenger operations, the ICC noted that the Wine Train was carrying an average of less than one carload of freight per month.<sup>32</sup> As noted by the ICC in the *Napa Valley* case, even where an operator offers both intrastate excursion service and interstate freight service, it is possible for the Board to conclude that while it does have jurisdiction over the freight operations, it does not similarly have jurisdiction over the passenger excursion service. As noted in *Napa Valley*, the ICC previously decided in its *Durango & S.N.G.R. Co. – Acquisition and Operation* decision, served August 21 1987 (Finance Docket No. 31024), that the scenic rail passenger

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

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service offered by the carrier was not subject to ICC jurisdiction even though its minimal freight operations were.<sup>33</sup>

Based on the *Durango* case, then, it is clear the Board may properly decline to exercise jurisdiction over GNP's intrastate excursion passenger service, while maintaining its jurisdiction over any freight service to be offered by GNP. This result is especially likely where the Board finds that GNP is offering a minimal amount of freight. Given GNP's current projections of the amount of freight it would transport along the reactivated rail lines subject to this proceeding, it seems appropriate for the Board, based on the *Napa Valley* and *Durango* decisions, to maintain jurisdiction over the limited freight that would be carried, but decline to exercise jurisdiction over the wholly intrastate excursion passenger service to be offered by GNP. Contrary to the assertions of GNP's Chief Financial Officer, were the Board to decline to exercise its jurisdiction over GNP's passenger service, correctly relying on its previous decisions summarized above, GNP's passenger excursion service would then be subject to the exclusive jurisdiction of applicable state and local laws as noted by the ICC in the *Napa Valley* case.<sup>34</sup>

The Board's hesitation to exercise its jurisdiction over excursion passenger service is also seen in Board decisions declining to open its offer of financial assistance procedures to such excursion service operators. For example, in the Board's *Kyle Railroad Company – Discontinuance Exemption – In Marshall, Washington, and Cloud Counties, Kansas* decision, the Board noted that while the Board had been notified by an organization of its interest in acquiring a portion of the line at issue for an excursion and tourism operation, because the proposal was not for continued rail freight service, such operations “fall outside the Board's

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

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regulatory jurisdiction.”<sup>35</sup> Previously, the ICC made a similar decision in an abandonment proceeding in which the ICC upheld a prior decision finding that an entity had not made a bona fide offer of financial assistance.<sup>36</sup> In upholding its decision and denying a petition to reopen, the ICC explained that the offer of financial assistance was not bona fide because the stated purpose for acquiring the line was to “create a passenger excursion operation as a tourist operation.”<sup>37</sup> Because the offer was not one for continued freight service, the offer of financial assistance procedures were not available to the organization.<sup>38</sup>

Given the Board’s past decisions that it does not have jurisdiction over wholly intrastate excursion passenger operations, and that limited freight operations do not provide the nexus required to make such operations interstate, it is appropriate for the Board to elect to decline to exercise its jurisdiction over GNP’s planned intrastate excursion passenger service. If the Board finds that it does not have jurisdiction over GNP’s intrastate excursion passenger service, the Board does not have the power to impose an obligation on the owner of a right-of-way to permit such excursion service.

Contrary to the public comments of GNP’s Chief Financial Officer, any status of GNP as a “federal railway” does not exempt the carrier from state and local laws, including its contracts and real estate law, regarding its passenger operations where the Board lacks jurisdiction over such operations. In the past, the Board has elected to maintain jurisdiction over a carrier’s

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<sup>35</sup> *Kyle Railroad Company – Discontinuance Exemption – In Marshall, Washington, and Cloud Counties, Kansas*, Docket No. AB-33 (Sub-No. 155X) (Dec. 13, 2000) (footnote 9).

<sup>36</sup> *The Atchison, Topeka and Santa Fe Railway Company – Abandonment Exemption – In Atchison County, Kansas*, Docket No. AB-52 (Sub-No. 79X) (April 13, 1995).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

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freight operations while not extending any such jurisdiction to excursion passenger service.

Given the similar facts in this proceeding to those found in other cases of the Board reaching this conclusion, a similar decision by the Board is appropriate in this case.

**C. Conclusion**

Sound Transit respectfully requests that the Board to:

1. Find that GNP has failed to establish that there is sufficient demand for freight rail services over the 9.1 miles of the Woodinville Subdivision and the Redmond to justify reactivation of such service or to vacate the interim trail easement over those segments;
2. Rule that applicants seeking to reactivate rail freight service over rail banked lines and to vacate the interim trail easement demonstrate that they either own the rail banked line or have negotiated with the owners the rights of access required for that purpose; and
3. Issue a declaratory order that the Board does not have the jurisdiction to require owners of rail banked corridors to also permit an applicant seeking to reactivate freight service to perform intrastate excursion or other intrastate passenger service.

Respectfully submitted,

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*Attorneys for the Central Puget  
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Dated: November 9, 2010

## **CERTIFICATE OF SERVICE**

I hereby certify that I have caused to be served a copy of the foregoing pleading COMMENTS OF CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY\* upon the undersigned persons either by First Class Mail, or for those who have consented to e-mail service, by e-mail on November 9, 2010:

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Bellevue, WA 98009

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Washington, DC 20036

Kurt Triplett  
City of Kirkland  
125 5<sup>th</sup> Avenue  
Kirkland, WA 98033

Mike Bates  
Woodinville Lumber, Inc.  
15900 Woodinville-Redmond Rd., N.E.  
Woodinville, WA 98072

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\* Parties marked with an asterisk will be served with **both** Confidential and Public versions.

Kathy Cox  
Marketing Philharmonic  
218 Main Street #668  
Kirkland, WA 98033

Andrea C. Ferster  
Rails-To-Rails Trails Conservancy  
2121 Ward Court, N.W. – 5<sup>th</sup> Floor  
Washington, D.C. 20037

Ernest F. Wilson  
17509 N.E. 38<sup>th</sup> Court  
Redmond, WA 98052

Don Davis  
Master Builders Association of  
King and Snohomish Counties  
335 116<sup>th</sup> Avenue SE  
Bellevue, WA 98004

Dean Kattler  
Waste Management Of Washington Inc.  
13225 N.E. 126<sup>th</sup> Place  
Kirkland, WA 98034

By: s/ Robert P. vom Eigen

## **EXHIBIT A**

**VERIFIED STATEMENT OF JOAN M. EARL, CEO,  
OF THE CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY**

- 1. My name is Joan M. Earl, and I am the Chief Executive Officer of the Central Puget Sound Regional Transit Authority ("Sound Transit"). I have served in this position since 2001.**
- 2. Sound Transit was created by the Pierce, King, and Snohomish Counties through action of their respective county councils in accordance with RCW 81.112.030. Sound Transit is authorized to plan, construct, and permanently operate a high-capacity system of transportation infrastructure and services to meet regional public transportation needs in the Central Puget Sound region. Chap 81.112 RCW. Sound Transit carried nearly 19 million riders in 2009 and is on schedule to carry nearly 25 million in 2010 on its regional bus, commuter rail, and light rail services.**
- 3. Sound Transit is participating in these proceedings because it is in the process of acquiring property interests in the Woodinville Subdivision and the Redmond Spur to expand and extend its transit services within the region. Further details on those transactions will be described below. The transit services Sound Transit plans to provide would, if necessary, share the Woodinville Subdivision and Redmond Spur rail corridors, although not the tracks, with any reactivated freight service provider. In that connection, Sound Transit must ensure that the freight service contemplated by GNP is economically viable, and capable of sustaining investments necessary to provide safe freight rail operations that will not disrupt or endanger our workers or passengers.**
- 4. In general elections held within the Sound Transit district on November 5, 1996 and November 8, 2008, voters approved local funding to implement a regional high-capacity transportation system for the Central Puget Sound region. Sound Transit's 2008 voter-approved plan ("ST2") included light rail (i.e., East Link project) and possible commuter rail over and across the Woodinville Subdivision and the Redmond Spur, or in the alternative to commuter rail funding, funding to expand regional bus service.**
- 5. The recent economic recession has led to a projected 25 percent decline in funding for Sound Transit projects. This forecast has caused me, as Chief Executive Officer, to recommend an ST2 program re-alignment that prioritizes our projects and funding. Sound Transit is proceeding with its East Link light rail project. However, I have recommended that the funding for commuter rail on the Woodinville Subdivision/regional bus expansion project be suspended.**
- 6. On May 14, 2009, the Sound Transit Board selected a preferred alternative for its East Link light rail project Draft Environmental Impact Statement that included use of portions of the Woodinville Subdivision and Redmond Spur. On April 22, 2010, the Sound Transit Board specified its preferred alternative for its Draft Environmental Impact Statement with regard to its use of the Redmond Spur. The preferred alternative would incorporate a design "[t]erminating the alternative at a downtown Redmond station located in the BNSF corridor near 161st Avenue to reduce the walking distance to the Redmond Transit Center and park and ride." While this section is within the boundary of GNP Rly, Inc.'s**

("GNP") reactivation petition, there are no proposed freight customers within the vicinity of 161<sup>st</sup> Avenue.

7. On July 22, 2010, the Sound Transit Board specified its preferred alternative for its Draft EIS with regard to its use of the Woodinville Subdivision by selecting the location of the Hospital Station as being "North of NE 8th Street" along the Woodinville Subdivision corridor. Sound Transit intends to use the Woodinville Subdivision approximately between milepost 12.4 and milepost 13.5 in Bellevue (the "Bellevue Mile"), which is about 8 miles from where GNP is seeking reactivation on the Woodinville Subdivision. Sound Transit's preferred alternative has an elevated station in the southernmost section of the Bellevue Mile (above a trail or reactivated freight line) and at-grade tracks on the northernmost section of the Bellevue Mile where there is sufficient space for light rail tracks next to the trail or reactivated freight line.

8. In November 2009, consistent with ST2, Sound Transit entered into a Memorandum of Understanding with King County, Washington; the Port of Seattle; the City of Redmond, Washington; the Cascade Water Alliance; and Puget Sound Energy, Inc. (collectively, the "Public Partners"), to purchase interests in the Woodinville Subdivision and Redmond Spur ("MOU").

9. Since the Port of Seattle purchased the Woodinville Subdivision and Redmond Spur from BNSF in 2009, the Public Partners have been working together to plan for the full utilization of the corridors for the benefit of their respective tax and rate payers subject, of course, to the interim trail use or the reactivation of a legitimate freight rail operation.

10. On June 22, 2010, the Port of Seattle sold portions of the Redmond Spur to the city of Redmond. Consistent with the MOU, the city of Redmond has agreed to convey an easement to Sound Transit for public transportation purposes within the Redmond Spur. In the Real Estate Purchase and Sale Agreement between Redmond and the Port of Seattle dated June 22, 2010 ("Purchase Agreement"), Redmond is required to convey the easement at the time Sound Transit pays consideration to acquire other real property interests in the Woodinville Subdivision. Specifically, Redmond will convey a non-exclusive permanent easement of varying widths to Sound Transit within the portions of the Redmond Spur owned by Redmond, for "public transportation uses, including the design, development, construction, operation, maintenance and repair of one or more high capacity transit facilities in and through [downtown Redmond near 161<sup>st</sup> Avenue]."

11. The public transportation easement that Redmond will convey to Sound Transit must be exercised consistent with the preservation of the corridor for future railroad use as required by 16 U.S.C. 1247(d), and consistent with other authorized uses planned by Redmond and the other parties to the MOU. Sound Transit is the intended beneficiary of the contractual provision contained in the Purchase Agreement and may independently enforce the provisions. Consistent with the MOU, Sound Transit is negotiating with the Port of Seattle to acquire real property interests in the Woodinville Subdivision and expects to receive the easement from Redmond concurrent with acquiring those interests.

12. On February 3, 2010, GNP's Chief Financial Officer Douglas Engle, said, at a meeting of business and government leaders sponsored by the Cascadia Center of the Discovery Institute, that GNP could provide commuter rail service more cheaply than Sound Transit (by a factor of ten) because it is a "federal railway." Mr. Engle further alleged that GNP could avoid state and local environmental and land use laws with regard to the construction and operation of an excursion train service, commuter rail service and trail because it is a federal railway. Mr. Engle said, "The beautiful part of being a federal railway is the state has no jurisdiction over us." Sound Transit is concerned about the implications of this statement. Through our participation in this proceeding we seek clarification of the effect that the grant of rail carrier status has upon federal and state regulation of an excursion train and related facilities.

#### VERIFICATION

State of Washington

County of King

SS:

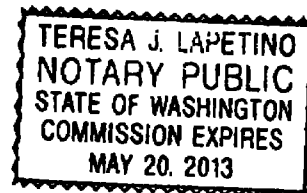
Joan M. Earl being duly sworn, deposes and says that she has read the foregoing statement, knows the facts asserted there are true and that the same are true as stated.

Joan M. Earl  
Joan M. Earl  
Chief Executive Officer  
Central Puget Sound Regional  
Transit Authority

Subscribed and sworn to before me this 8 day of November 2010.

Teresa J. Lapetino  
Notary Public of the State of Washington.

My Commission expires 5-30-2013



## **EXHIBIT B**

**Intentionally omitted – contains confidential material**

## **EXHIBIT C**

Intentionally omitted – contains confidential material

**EXHIBIT D**



**Statement of Thomas Payne, Chairman and C.O.O.  
GNP Railway, Inc.  
Regarding the Sound Transit Proposed 2011 Budget  
and  
Proposed 2011 Service Implementation Plan**

- Good afternoon, I am Tom Payne, many of you know me, I am the Chairman and C.O.O. of GNP Rly, Inc. We presently operate common carrier freight rail service on the former eastside BNSF corridor from the City of Snohomish to Woodinville.
  - I'm sure many of you know that we have applied to the US Surface Transportation Board to re-activate the portion of the corridor from Woodinville to Redmond.
  - I am here today to ensure that each of you know about our plans and that there is no misunderstanding about our intentions.
  - From the time in early 2007 that we purchased rights on the northern part of the corridor from Snohomish County, we have told anyone who would ask ...and recounted to anyone who would listen, that we intended to re-activate the entire corridor portion-by-portion, on our schedule, as finances and events would allow.
  - That is still our plan.
-

**It has three parts.**

- **The first part of our plan is to provide common carrier freight service where customers demand. As an aside, we never imagined that the freight demand would be as large as it is.**
- **After the track and bridges are rehabilitated, we will initiate the second part of our plan, (as we are contracted with the Port of Seattle to do) - a passenger train "excursion" on the corridor,**

**...think of it as a "Bite of Seattle" on rails !**

- **The third part of our plan is to provide common carrier, "commuter" service throughout the corridor. We envision those commuter station areas to be the region's prime transit oriented development locations, and why not? The corridor runs directly through the growth centers of the eastside.**
- **Our dream is to ultimately connect the north end at Snohomish with the Sounder and AMTRAK in Everett, and on the south end at Renton with Sounder and Link to SeaTac airport.**
- **GNP's plan takes action on a timely opportunity to get thousands of truckloads of freight traffic off the highways, encourage additional employment, increased tourism and new economic development. As an added benefit, rail's efficiency and environmental friendliness is well established.**

- **Thousands of everyday eastside residents see the wisdom in our plan... and they are e-mailing and calling us to ask when things are going to happen.**
- **We have never planned to ask any local or regional jurisdiction for public funding. We had our plan before ST2 came along, and quite frankly, we are executing our plan now.**
- **Many believed that the \$50 million was only added to the ST2 program to gain eastside votes and that some way would be found to eliminate it or utilize it elsewhere.**
- **GNP has always been open to team with Sound Transit and utilize the funds the voters approved to;**
  - **purchase new commuter vehicles,**
  - **construct a first rate maintenance facility for them,**
  - **and to provide increased station area amenities.**
- **Our door is always open to that discussion. ...But we have our plan and we are executing it!**
- **Thank you for the opportunity to make these remarks; I would be open to any question.**